

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAELECTRONIC FRONTIER  
FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. [10-cv-04892-RS](#)**ORDER RE REQUEST FOR  
CLARIFICATION**

A ruling previously issued on the parties' cross-motions for summary judgment in this action brought under the Freedom of Information Act ("FOIA"). That order directed the government to produce certain additional materials. The parties seek clarification, however, as to whether the government may continue to withhold 16 specific pages of documents. The issue arises because the government previously asserted that Exemption 4 applied to material in those pages, a claim that the summary judgment order rejected. The prior order concluded, "[t]o the extent DEA has withheld any documents or portions thereof [Exemption 4] *and no other exemption applies*, that material must be produced." (Emphasis added.) While the government produced one additional page that it had previously withheld *only* under Exemption 4, it continues to withhold the 16 pages in dispute under other exemption claims.

The government is correct that the prior order left nothing undecided. Among other things, the government's assertions of Exemptions 5 and 7(E) were upheld, and its efforts to segregate any non-exempt material were found to be adequate. See Dkt. No. 75. Plaintiff insists that it

1 would be inconsistent to claim material is exempt under both Exemption 4 and Exemption 5,  
2 because the former protects materials received in confidence from third parties, whereas the latter  
3 (often referred to as “deliberative process” in shorthand) protects materials generated by the  
4 government. Reasoning that material cannot simultaneously be generated by third parties and by  
5 the government, plaintiff contends the two exemptions are mutually exclusive, and that therefore  
6 the assertion of Exemption 5 must be improper. As an initial matter, even were it always improper  
7 to claim both exemptions, it would not follow that a claim under Exemption 5 automatically fails  
8 where, as here, there has been a finding that Exemption 4 does *not* apply. Rather, a conclusion  
9 that one exemption is inapt would, as a theoretical matter, avoid the supposed conflict in claiming  
10 them both.

11 More fundamentally, however, there simply is no conflict in claiming both exemptions in  
12 appropriate circumstances. The documents here provide such an example. They consist of  
13 communications generated by and within the government, which in some instances make  
14 reference to information obtained from third parties. Although the prior order found that the third-  
15 party information did not warrant protection from disclosure under Exemption 4, even if it had,  
16 application of Exemption 5 would still be appropriate to protect the deliberative process reflected  
17 in the government’s internal discussions regarding that information. While the bare facts provided  
18 by the third party would not be protected, the discussion of those facts would be. As noted, the  
19 prior order found that the effort to produce all segregable unprotected material was adequate.

20 For the same reasons, plaintiff’s contention that there is conflict between claims of  
21 Exemption 4 and Exemption 7(E) also fail. Although the Exemption 4 claim was rejected in part  
22 because some of the information regarding third parties was publicly known, the mere inclusion of  
23 such facts in other discussions does not preclude the application of Exemption 7(E) to those  
24 discussions.

25 Accordingly, the conclusions of the prior order are unchanged. The government need not  
26 produce the remaining 16 pages because they do not fall within the prior order’s direction to  
27 release materials for which Exemption 4 was claimed, “and no other exemption applies.” The  
28

Clerk shall close the file.

**IT IS SO ORDERED.**

Dated: March 4, 2016

A handwritten signature in black ink, appearing to read "Richard Seeborg", written over a horizontal line.

RICHARD SEEBORG  
United States District Judge

United States District Court  
Northern District of California